

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 09-00472 CW

JOHN HENDRICKSON, an individual; and
JENNIFER HENDRICKSON, an individual,

ORDER GRANTING IN
PART AND DENYING IN
PART DEFENDANTS'
MOTIONS TO DISMISS

Plaintiffs,

v.

POPULAR MORTGAGE SERVICING, Inc., et
al.,

Defendants.

Plaintiffs John and Jennifer Hendrickson charge Defendants Popular Mortgage Servicing, Equity One, Household Financing Corp. (HFC), Litton Loan Servicing and LandAmerica One Stop with violating federal and California statutory law and California common law in connection with the sale of certain residential mortgage products. Defendants filed three separate motions to dismiss: HFC and Litton filed a joint motion; Popular and Equity One also filed a joint motion; and LandAmerica filed its own motion.¹ Plaintiffs oppose the motions. The matter was heard on

¹Plaintiffs object to Popular's and Equity One's joinder in HFC's motion to dismiss as untimely. The Court denies this objection as moot because all parties have had sufficient time to

(continued...)

1 April 30, 2009. Having considered oral argument and all of the
2 papers submitted by the parties, the Court grants Defendants'
3 motions in part and denies them in part and grants leave to amend.

4 BACKGROUND

5 On June 2, 2003, Plaintiffs purchased a home in Sonoma County,
6 California for \$420,000, with the assistance of a home loan (first
7 mortgage). The complaint does not explicitly mention the name of
8 the company that provided Plaintiffs with this loan. However, it
9 appears from documents attached to the complaint and the moving
10 papers that People's Choice Home Loan supplied the loan and Popular
11 serviced it.

12 In April, 2006, Plaintiffs spoke with HFC about obtaining a
13 second mortgage. During this conversation, HFC "indicated that a
14 loan could be obtained, which would be favorable to Plaintiffs by
15 consolidating higher interest debt at a lower rate. Plaintiffs
16 were also told they would be able to benefit from a 'good customer'
17 interest rate reduction after a few months of timely payments on
18 the loan." Complaint, ¶ 27. In May, 2006, HFC told Plaintiffs
19 that, to qualify for the loan, they would also be required to
20 consolidate their other outstanding debt, which carried low
21 interest rates. Id. at ¶ 28. Included in the amount to be
22 consolidated was \$26,217 in Plaintiffs' student loans, which was
23 then accruing interest at 2.25 percent. Plaintiffs agreed and
24 established a second mortgage with HFC, financing \$61,194 at an
25 interest rate of 13.95 percent. Of this amount, \$41,076 was
26 disbursed to Plaintiffs' other creditors to pay off outstanding

27 ¹(...continued)
28 brief the matter.

1 debts as part of the consolidation requirement. HFC also disbursed
2 \$16,392 in cash to Plaintiffs to be used for future education
3 expenses.

4 In December, 2006, Plaintiffs contacted HFC to negotiate a
5 lower interest rate on the second mortgage. HFC offered Plaintiffs
6 the chance to refinance it at a lower rate due to Plaintiffs' good
7 payment history. Id. at ¶ 30. In a later conversation, but before
8 signing the new loan, HFC informed Plaintiffs that, to qualify for
9 the interest rate reduction, they would have to consolidate
10 additional debt. Plaintiffs agreed and on January 26, 2007, they
11 refinanced the second mortgage at a rate of 11.415 percent. The
12 new amount of the second mortgage was \$82,149, which included a
13 \$1,193 cash payout to Plaintiffs.

14 In October, 2007, Plaintiffs contacted Popular to discuss a
15 modification of their first mortgage. In a few months, the
16 interest rate on the first mortgage would switch from a fixed rate
17 to a variable rate, and Plaintiffs wanted to secure a favorable
18 fixed rate loan for an extended period of time. Popular referred
19 Plaintiffs to Equity One. Equity One offered Plaintiffs a fixed
20 rate loan at one percent higher than the original fixed rate on the
21 first mortgage. Equity One "assured [Plaintiffs that they] would
22 qualify and the modification would be completed expeditiously."
23 Complaint ¶ 14.

24 As part of the loan application process, Plaintiffs provided
25 Equity One with various personal financial information, including
26 their monthly income and expenses. Equity One used this
27 information to prepare a financial worksheet for Plaintiffs to
28 verify, sign and date. The worksheet contained four columns with

1 the following headings: monthly expenses, stated amounts,
2 confirmation and initial. On October 23, 2007, Equity One emailed
3 the worksheet to Plaintiffs with the first two columns completed
4 and stated that, when filling out the remainder of the document,
5 they should "be sure to write numbers in the confirmation column,
6 just like what I have in the stated amount column, and then initial
7 in the initial column." Complaint, Exh. B. Plaintiffs did as
8 Equity One instructed -- they copied the figure in the stated
9 amounts column to the confirmation column, initialed next to each
10 amount, and signed and returned the worksheet to Equity One. The
11 next day, Plaintiffs "realized" that the financial information on
12 the worksheet was not accurate and that it "had been changed
13 without their knowledge." Complaint ¶ 17. The worksheet listed
14 phone expenses as \$300 per month, education and daycare expenses as
15 \$0 per month and insurance expenses as \$600 per month. However, in
16 earlier discussions, Plaintiffs told Equity One that their phone
17 expenses were \$53 per month, education and daycare expenses were
18 \$1200 per month and insurance expenses were \$248 per month. The
19 financial worksheet that Plaintiffs signed understated their
20 expenses by \$601 per month.

21 Plaintiffs wrote Equity One an email about this inaccuracy.
22 Equity One responded, "Just write what I have . . . If I made them
23 higher, it is for a reason . . . to make it work . . . thanx." On
24 December 11, 2007, Plaintiffs completed the loan modification
25 agreement by sending Equity One \$11,655.92 in loan payments, and
26 signed and notarized the loan documents.

27 In January, 2008, Plaintiffs received a monthly statement from
28 Equity One that listed their new mortgage payment as \$3,327.22.

1 Plaintiffs allege that this amount was "contrary to the assertions
2 of Equity one." Complaint ¶ 22. The complaint does not describe
3 how or why this amount was contrary to anything Equity One stated.
4 At some point between January, 2008 and August, 2008, Plaintiffs
5 fell behind in their payments on the second mortgage. On August
6 29, 2008, a Notice of Default regarding this loan was recorded.
7 LandAmerica was listed as the foreclosure trustee.

8 In November, 2008, the first mortgage held by Equity One "was
9 sold or transferred" to Wells Fargo. Complaint ¶ 35. As part of
10 this transaction, Litton Loan Servicing became Plaintiffs' new loan
11 servicing company for this mortgage. Id. On November 17, 2008,
12 Plaintiffs wrote to Litton and challenged the validity of the debt
13 underlying the mortgage. Complaint, Exh. O. Plaintiffs explained
14 that the loan was not valid because it was based on false income
15 information. Id. Litton responded on December 1, 2008 with a
16 letter that acknowledged receipt of Plaintiffs' letter and noted
17 that it would take sixty days to respond. Complaint, Exh. P.
18 Litton advised Plaintiffs to continue to make loan payments during
19 this time period. Id.

20 On December 22, 2008, Plaintiffs "received 36 letters
21 concerning a Notice of Trustee Sale" via regular mail. Complaint
22 ¶ 39. Plaintiffs attached a few of these notices to the complaint,
23 but they are mostly illegible. It is not entirely clear from the
24 complaint, but it appears that at least one of these notices was
25 sent by Litton. The notices listed a January 15, 2009 trustee sale
26 date. On December 23, 2008, Plaintiffs called Litton and were told
27 that their loan was "not in foreclosure status, that there was no
28 demand date set," and that the "entire account was on hold due to

1 the possibility of pending litigation." Complaint ¶ 40. The
2 complaint is not clear as to whether the "possibility of pending
3 litigation" refers to the present lawsuit or a different legal
4 action.

5 Plaintiffs filed the present complaint in Sonoma County
6 Superior Court on January 5, 2009. Plaintiffs plead twelve causes
7 of action in their complaint: (1) Fraud; (2) Negligent
8 Misrepresentation; (3) Negligence; (4) Breach of Fiduciary Duty;
9 (5) Constructive Fraud; (6) Breach of Implied Covenant of Good
10 Faith and Fair Dealing; (7) Unfair Debt Collection Practices;
11 (8) Violations of Real Estate Settlement Procedures Act;
12 (9) Violations of Predatory Lending Act; (10) Unfair Business
13 Practices; (11) Declaratory Relief; and (12) Request for a
14 Temporary Restraining Order, Preliminary Injunction and Permanent
15 Injunction. The superior court signed a temporary restraining
16 order enjoining the sale of Plaintiffs' home. On February 2, 2009,
17 Defendants removed the case to federal court.

18 Defendant HFC moves to dismiss claims one through six and
19 eight through twelve. Defendants Litton and LandAmerica move to
20 dismiss claims one through seven and ten through twelve. Defendants
21 Popular Mortgage and Equity One move to dismiss claims one through
22 seven, ten and twelve.

23 LEGAL STANDARD

24 II. Motion to Dismiss for Failure to State a Claim

25 A complaint must contain a "short and plain statement of the
26 claim showing that the pleader is entitled to relief." Fed. R.
27 Civ. P. 8(a). When considering a motion to dismiss under Rule
28 12(b)(6) for failure to state a claim, dismissal is appropriate

1 only when the complaint does not give the defendant fair notice of
2 a legally cognizable claim and the grounds on which it rests.
3 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
4 considering whether the complaint is sufficient to state a claim,
5 the court will take all material allegations as true and construe
6 them in the light most favorable to the plaintiff. NL Indus., Inc.
7 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court
8 is generally confined to consideration of the allegations in the
9 pleadings, when the complaint is accompanied by attached documents,
10 such documents are deemed part of the complaint and may be
11 considered in evaluating the merits of a Rule 12(b)(6) motion.
12 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

13 When granting a motion to dismiss, the court is generally
14 required to grant the plaintiff leave to amend, even if no request
15 to amend the pleading was made, unless amendment would be futile.
16 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
17 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
18 would be futile, the court examines whether the complaint could be
19 amended to cure the defect requiring dismissal "without
20 contradicting any of the allegations of [the] original complaint."
21 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
22 Leave to amend should be liberally granted, but an amended
23 complaint cannot allege facts inconsistent with the challenged
24 pleading. Id. at 296-97.

25 DISCUSSION

26 The Court discusses Plaintiffs' twelve causes of action in
27 turn.
28

I. First and Second Causes of Action: Fraud and Negligent Misrepresentation

Under California law, "[t]he elements of fraud, which gives rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003) (quoting Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996)). A claim for fraud under the tort of negligent misrepresentation does not require scienter or intent to defraud; rather, to establish fraud through nondisclosure or concealment of facts, it is necessary to show that the defendant "was under a legal duty to disclose them." Lingsch v. Savage, 213 Cal. App. 2d 729, 735 (1963); Buckland v. Threshold Enterprises, Ltd., 155 Cal. App. 4th 798 (2007).²

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. Proc. 9(b). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).

²Most district courts within the Ninth Circuit have held that a negligent misrepresentation claim is subject to the heightened pleading requirements of Rule 9(b). Deitz v. Comcast Corp., 2006 WL 3782902 (N.D. Cal.); Neilson v. Union Bank of California, N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (stating that the elements of a cause of action for negligent misrepresentation are the same as those of a claim for fraud, with the exception that the defendant need not actually know the representation is false).

1 Statements of the time, place and nature of the alleged fraudulent
2 activities are sufficient, id. at 735, provided the plaintiff sets
3 forth "what is false or misleading about a statement, and why it is
4 false." In re GlenFed, Inc., Securities Litigation, 42 F.3d 1541,
5 1548 (9th Cir. 1994). Scierter may be averred generally, simply by
6 saying that it existed. Id. at 1547; see Fed. R. Civ. Proc.
7 9(b)("Malice, intent, knowledge, and other condition of mind of a
8 person may be averred generally"). Allegations of fraud based on
9 information and belief usually do not satisfy the particularity
10 requirements of Rule 9(b); however, as to matters peculiarly within
11 the opposing party's knowledge, allegations based on information
12 and belief may satisfy Rule 9(b) if they also state the facts upon
13 which the belief is founded. Wool v. Tandem Computers, Inc., 818
14 F.2d 1433, 1439 (9th Cir. 1987).

15 A. Fraud and Negligent Misrepresentation Claim Against HFC
16 Plaintiffs' complaint fails to plead the manner in which any
17 of HFC's statements are false. Plaintiffs argue that five
18 statements HFC made were misrepresentations. In each of these
19 statements HFC indicated that Plaintiffs could obtain a loan with a
20 favorable interest rate. Plaintiffs argue that these statements
21 were false because when HFC first mentioned the possibility of a
22 lower interest rate, it did not contemporaneously note that
23 consolidating other debt, which had lower interest rates at the
24 time, would be required.

25 For instance, Plaintiffs assert that in April, 2006, "HFC
26 representatives indicated a loan could be obtained, which would be
27 favorable to Plaintiffs by consolidating higher interest debt at a
28 lower rate," complaint ¶ 27, which was a misrepresentation because

1 Plaintiffs were later told that they would have to consolidate
2 their low-interest student loan debt into the loan. However,
3 conditions upon which loan approval depends does not make a
4 misrepresentation out of a statement that a loan "could be
5 obtained."

6 Plaintiffs assert that HFC made a second and similar
7 misrepresentation when it stated in April, 2006, that Plaintiffs
8 "would be able to benefit from a 'good customer' interest rate
9 reduction after a few months of timely payments on the loan."
10 Complaint ¶ 27. This statement is allegedly false because
11 Plaintiffs were later told about the requirement to consolidate
12 their low interest loans. As alleged, HFC made no promises that
13 timely payments alone would result in the reduction of the interest
14 rate on Plaintiffs' loan. Therefore, requiring consolidation as a
15 condition of loan approval did not make a misrepresentation out of
16 HFC's general statement about the possibility of obtaining a "good
17 customer" interest rate reduction.

18 Plaintiffs assert that three additional statements by HFC in
19 May, 2006, December, 2006 and January, 2007 were also
20 misrepresentations. However, these three statements, similar to
21 the two described above, all concern HFC's requirement to
22 consolidate Plaintiffs' other debt in order to obtain a lower
23 interest rate. As plead, Plaintiffs have not alleged that HFC made
24 any misrepresentations about this requirement.

25 B. Fraud and Negligent Misrepresentation Claim Against
26 Litton

27 The complaint, as plead, does not put Litton on notice as to
28 its role in the alleged fraud. The complaint merely notes that

1 Litton (1) became Plaintiffs' loan servicer in November, 2008,
2 (2) mailed Plaintiffs a validation-of-debt notice on November 17,
3 2008, (3) initiated foreclosure proceedings by sending out a notice
4 of trustee's sale on December 22, 2008 and (4) notified Plaintiffs
5 that the trustee sale would be placed on hold due to apparent
6 pending litigation. Though Plaintiffs dispute the validity of the
7 debt underlying the loan, they have not put Litton on notice of the
8 particular misconduct which is alleged to constitute the fraud.

9 C. Fraud and Negligent Misrepresentation Claim Against
10 Equity One and Popular

11 Plaintiffs argue that their fraud claim against Equity One
12 applies equally to Popular because "the entities are one and the
13 same," and that Equity One is Popular's alter ego. Opposition at
14 5. Nothing in the complaint supports this theory. Therefore, the
15 Court treats the two companies as separate entities.

16 Plaintiff has not alleged any facts pertaining to Popular's
17 conduct that constitute fraud. The complaint notes that Plaintiffs
18 contacted Popular to discuss refinancing and that Popular referred
19 them to Equity One. Plaintiffs do not provide any further detail
20 as to Popular's role in the alleged fraud. These allegations do
21 not support a cause of action for fraud.

22 As to Equity One, Plaintiffs have adequately described with
23 particularity the circumstances constituting fraud with respect to
24 some of their allegations. Plaintiffs have alleged that Equity One
25 instructed them to falsify information on a financial worksheet in
26 order to help them qualify for a mortgage modification. The
27 allegations in the complaint are sufficiently specific to enable
28 Equity One to articulate a defense, and thus the requirements of

1 Rule 9(b) are satisfied.

2 However, the complaint does not contain allegations
3 pertaining to the claim that the monthly loan payment amount that
4 was allegedly promised by Equity One differed from the actual
5 amount that the parties agreed to. Plaintiffs failed to allege the
6 payment amount that they were allegedly promised, who purportedly
7 made the promise and when these promises were made.

8 D. Fraud and Negligent Misrepresentation Claim Against
9 LandAmerica

10 Plaintiffs fail to plead any facts with respect to
11 LandAmerica's role in any of the causes of actions alleged in the
12 complaint. Plaintiffs simply argue that "the same arguments as to
13 each defendant apply equally to LandAmerica, who was acting as an
14 agent of the directing agency." Opposition to LandAmerica's Motion
15 to Dismiss at 6. However, Plaintiffs fail to note which agency was
16 the "directing agency." Instead, Plaintiffs assert that each
17 Defendant was the agent, servant, or employee of each other, acting
18 "with the consent, express and implied, of the other defendants."
19 Complaint ¶ 9. Though a principal may be liable for the acts of an
20 agent, an agent is not responsible for the acts of another agent,
21 nor is an agent responsible for the acts of the principal. To hold
22 LandAmerica liable on this cause of action, Plaintiffs must clarify
23 its role with respect to the facts alleged and the other
24 Defendants. As it stands, the complaint fails to do this.

25 II. Third Cause of Action: Negligence

26 To be liable for negligence, the defendants must owe a duty
27 of care to the person injured. Nymark v. Heart of Fed. Savings &
28 Loan Assn., 231 Cal. App. 3d 1089, 1095 (1991). Defendants assert

1 that they do not owe Plaintiffs any duty of care.

2 A. Negligence Claim Against HFC and Equity One

3 "[A]s a general rule, a financial institution owes no duty of
4 care to a borrower when the institution's involvement in the loan
5 transaction does not exceed the scope of its conventional role as a
6 mere lender of money." Id. at 1096; see also Kinner v. World
7 Savings & Loan Assn., 57 Cal. App. 3d 724, 732 (1976) (holding no
8 duty of care owed by lender to borrower to ensure adequacy of
9 construction loan); Wagner v. Benson, 101 Cal. App. 3d 27, 35
10 (1980) (finding no duty owed by lender to borrower where lender is
11 not involved extensively in borrower's business). Plaintiffs have
12 not plead that HFC's involvement in the loan transaction exceeds
13 the scope of its conventional role as a mere money lender.
14 However, Plaintiffs have adequately plead that, by encouraging
15 Plaintiffs to falsify information on a financial worksheet, Equity
16 One exceeded the scope of its conventional role as a money lender.
17 Therefore, the Court will not dismiss the negligence cause of
18 action against Equity One.

19 Plaintiffs also argue that HFC owes them a duty of care by
20 asserting that HFC is a "broker" under California Business and
21 Professions Code § 10131. This section defines a broker as a

22 person who, for a compensation or in expectation of a
23 compensation, regardless of the form of payment, does or
24 negotiates to do one or more of the following acts for
25 another or others: . . . (d) Solicits borrowers or
26 lenders for or negotiates or collects payments or
performs services for borrowers or lenders or note
owners in connection with loans secured directly or
collaterally by liens on real property or on a business
opportunity.

27 However, all of the alleged actions about which Plaintiffs complain
28 were undertaken by employees of HFC itself. No one acted as a

1 broker.

2 Plaintiffs next argue that California Civil Code § 1701
3 creates a duty of care. Section 1701 provides, "Every person is
4 bound, without contract, to abstain from injuring the person or
5 property of another, or infringing upon any of his or her rights."
6 However, this section is a general statement of the law and does
7 not create a duty where one does not otherwise exist. For these
8 reasons, HFC does not owe Plaintiffs a duty of care.

9 B. Negligence Claim Against Litton and Popular

10 Litton relies entirely on HFC's arguments pertaining to the
11 negligence cause of action and duty of care. Litton cannot adopt
12 all of HFC's arguments because Litton is a loan servicing company,
13 whereas HFC is a money lender.

14 To support Plaintiffs' negligence claim against Litton, they
15 merely point to the existence of Exhibits N, O, P, R and S.³
16 Standing alone, these documents do not establish a duty of care.
17 Further, Plaintiffs have not alleged that Litton's or Popular's
18 involvement in the loan transactions exceeded the scope of their
19 conventional roles as mere loan servicing companies. See Nymark,
20 231 Cal. App. 3d at 1096; Marks v. Ocwen Loan Servicing, 2008 U.S.
21 Dist. LEXIS 12175 (N.D. Cal.).

22 C. Negligence Claim Against LandAmerica

23 A trustee in a nonjudicial foreclosure is "not a true trustee
24 with fiduciary duties, but rather a common agent for the trustor
25 and beneficiary." Pro Value Properties, Inc. v. Quality Loan

26
27 ³In many instances in their briefs, Plaintiffs responded to
28 Defendants' motions by simply identifying exhibits to their
complaint without any supplemental argument. This method of
argumentation is unavailing and unhelpful to the Court.

1 Service Corp., 170 Cal. App. 4th 579, 583 (2009). As such, the
2 scope and nature of the trustee's duties in a nonjudicial
3 foreclosure "are exclusively defined by the deed of trust and the
4 governing statutes. No other common law duties exist." Pro Value
5 Properties, Inc. v. Quality Loan Service Corp., 170 Cal. App. 4th
6 579, 583 (2009). Therefore, LandAmerica, as the foreclosure
7 trustee, did not owe Plaintiffs a duty of care beyond that set
8 forth in the governing statutes, California Civil Code § 2924 et
9 seq.

10 III. Fourth Cause of Action: Breach of Fiduciary Duty

11 "A debt is not a trust and there is not a fiduciary relation
12 between debtor and creditor as such. The same principle should
13 apply with even greater clarity to the relationship between a bank
14 and its loan customers." Price v. Wells Fargo Bank, 213 Cal. App.
15 3d 465, 476 (1989) (internal quotations and citations omitted).
16 Nothing in the complaint sufficiently describes the manner in which
17 the loans granted to Plaintiffs by HFC and Equity One, or the
18 servicing of those loans by Popular and Litton, create fiduciary
19 relationships. Similarly, LandAmerica does not have a fiduciary
20 duty to Plaintiffs because a trustee in a nonjudicial foreclosure
21 is "not a true trustee with fiduciary duties, but rather a common
22 agent for the trustor and beneficiary." Pro Value Properties, 170
23 Cal. App. 4th at 583.

24 IV. Fifth Cause of Action: Constructive Fraud

25 "Constructive fraud is a unique species of fraud applicable
26 only to a fiduciary or confidential relationship." Salahutdin v.
27 Valley of California, Inc., 24 Cal. App. 4th 555, 562 (1994).
28 Generally, the law states that "constructive fraud comprises any

1 act, omission or concealment involving a breach of legal or
2 equitable duty, trust or confidence which results in damage to
3 another even though the conduct is not otherwise fraudulent." Id.
4 Because Plaintiffs have not properly asserted a confidential or
5 fiduciary relationship with any Defendants, they cannot sustain a
6 constructive fraud cause of action.

7 V. Sixth Cause of Action: Breach of Implied Covenant of Good
8 Faith and Fair Dealing

9 At the hearing on this motion, Plaintiffs notified the Court
10 that they will not pursue this cause of action. Therefore, the
11 Court dismisses it with prejudice.

12 VI. Seventh Cause of Action: Unfair Debt Collection Practices

13 It is not clear from the complaint which Defendants violated
14 which sections of the Rosenthal Fair Debt Collection Practices Act,
15 California Civil Code § 1788 et seq., and the Federal Fair Debt
16 Collection Practices Act, 15 U.S.C. § 1692 et seq. Therefore,
17 Defendants are not on fair notice of these claims against them.

18 VII. Eighth Cause of Action: Real Estate Settlement Procedures Act
(RESPA)

19 RESPA places a duty upon loan servicers to respond to
20 "qualified written requests." A qualified written request is one
21 that includes identifying information of the borrower and "a
22 statement of the reasons for the belief of the borrower, to the
23 extent applicable, that the account is in error or provides
24 sufficient detail to the servicer regarding other information
25 sought by the borrower." 12 U.S.C. § 2605(c)(1). Plaintiffs argue
26 that exhibit M satisfies this requirement. Exhibit M is a letter
27 from Plaintiffs to HFC that describes the alleged manner in which
28 they were the victims of fraud. In bold capital letters at the top

1 of the letter, Plaintiffs wrote, "CALIFORNIA CIVIL CODE § 1782
2 NOTICE OF DEMAND." This letter does not constitute a "qualified
3 written request" because HFC is not a loan servicer and the letter
4 does not mention RESPA or loan servicing.

5 VIII. Ninth Cause of Action: Predatory Lending Act

6 The Predatory Lending Act prohibits a lender from refinancing
7 a loan if the refinancing "does not result in an identifiable
8 benefit to the consumer, considering the consumer's stated purpose
9 for seeking the loan, fees, interest rates, finance charges, and
10 points." Cal. Fin. Code § 4973(j). Plaintiffs allege that they
11 received no identifiable benefit when they obtained their second
12 mortgage or when they refinanced that mortgage. Plaintiffs' stated
13 goal for obtaining and refinancing that second mortgage was to keep
14 their interest rates low. However, as a condition of obtaining and
15 refinancing the mortgage, Plaintiffs were required to consolidate
16 their other outstanding debt, which was at a low interest rate,
17 into a higher rate. For instance, before obtaining their second
18 mortgage, Plaintiffs' had a student loan of \$26,217, which was
19 accumulating interest at a rate of only 2.25 percent. However,
20 after consolidation, the student loan debt carried an interest rate
21 of 13.95 percent, as did all of their other consolidated debt
22 included in the second mortgage. Plaintiffs assert that
23 consolidating their student loan debt only benefitted HFC, not
24 Plaintiffs. HFC counters that, irrespective of the higher interest
25 rate placed upon Plaintiffs' student loans after consolidation,
26 Plaintiffs benefitted from the second mortgage and refinancing by
27 receiving cash payments totaling over \$17,000. The Court concludes
28 that, though the cash payment may have benefitted Plaintiffs, their

1 stated purpose for seeking a second mortgage and refinancing was to
2 obtain a low interest rate. Overall, because of the consolidation
3 requirement, Plaintiffs did not benefit from these transactions.
4 Therefore, the Court denies HFC's motion to dismiss this cause of
5 action.

6 IX. Tenth Cause of Action: California's Unfair Competition Law
7 Claims

8 California's Unfair Competition Law (UCL) prohibits any
9 "unlawful, unfair or fraudulent business act or practice." Cal.
10 Bus. & Prof. Code § 17200. The UCL incorporates other laws and
11 treats violations of those laws as unlawful business practices
12 independently actionable under state law. Chabner v. United Omaha
13 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of
14 almost any federal, state, or local law may serve as the basis for
15 a UCL claim. Saunders v. Superior Ct., 27 Cal. App. 4th 832, 838-
16 39 (1994). In addition, a business practice may be "unfair or
17 fraudulent in violation of the UCL even if the practice does not
18 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,
19 827 (2003). Although the complaint is not without flaws, it
20 adequately describes how HFC and Equity One allegedly committed
21 unfair business practices. However, Plaintiffs have not
22 sufficiently plead that the actions of Litton, Popular and
23 LandAmerica constituted unfair business practices. As alleged,
24 nothing about how these companies conducted their daily operations
25 leads to a reasonable inference that they acted unlawfully.

26 X. Eleventh Cause of Action: Declaratory Relief

27 The Declaratory Judgment Act permits a federal court to
28 "declare the rights and other legal relations" of parties to "a

1 case of actual controversy." 28 U.S.C. § 2201; see Wickland Oil
2 Terminals v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986). The
3 "actual controversy" requirement of the Declaratory Judgment Act is
4 the same as the "case or controversy" requirement of Article III of
5 the United States Constitution. American States Ins. Co. v.
6 Kearns, 15 F.3d 142, 143 (9th Cir. 1993). Defendants assert that
7 an action for declaratory relief cannot lie because there is not an
8 "actual controversy" between themselves and Plaintiffs. Although,
9 in this order, the Court dismisses many causes of action plead
10 against Defendants, claims survive so as to warrant the use of
11 declaratory judgment.

12 XI. Twelfth Cause of Action: Injunctive Relief

13 Injunctive relief is a remedy, not a cause of action.
14 Therefore, the Court dismisses this claim against all Defendants.
15 Plaintiffs may seek injunctive relief on other causes of action as
16 appropriate.

17 CONCLUSION

18 For the foregoing reasons, the Court grants in part
19 Defendants' motions to dismiss and denies them in part. The Court
20 grants Plaintiffs leave to amend their complaint. In addition to
21 addressing the deficiencies outlined in this Order, Plaintiffs
22 should amend their complaint to describe which of Defendants' acts
23 pertain to each cause of action.

24 Plaintiffs may file and serve an amended complaint within
25 twenty (20) days of this order. Defendants shall respond with an
26 answer or a motion to dismiss twenty (20) days thereafter. If
27 Defendants respond by filing a motion to dismiss, they are strongly
28 encouraged to join in a single brief. A further case management

1 conference will be held on the same date as the hearing on the
2 motion. If no motion to dismiss is filed, a further case
3 management conference will be held on August 4th, 2009 at 2:00 p.m.

4 IT IS SO ORDERED.

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6 Dated: 5/21/09



7 CLAUDIA WILKEN
8 United States District Judge
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